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State v. Anderes Appellant's Brief Dckt. 41744

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. LEIGH BROOKS ANDERES, Defendant-Appellant.	NO. 41744 ADA COUNTY NO. CR 2013-6054 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

Ms. Anderes appeals from the district court's Judgment and Commitment. Ms. Anderes was found guilty of battery upon a probation officer after a jury trial. She asserts that the prosecution committed misconduct when it repeatedly called her a liar and vouched for the credibility of the State's witnesses during closing arguments. The prosecutorial misconduct was not objected to; however, Ms. Anderes asserts that the misconduct amounted to fundamental error, that it was not harmless, and that her felony conviction must be overturned.

Furthermore, Ms. Anderes asserts that the district court abused its discretion in ordering restitution for the entirety of the alleged victim's shoulder surgery because the surgery not only repaired damage from the alleged battery, but also treated joint/bone issues not related to the battery. She also asserts that the district court abused its discretion in ordering her to pay for the replacement of a pair of sunglasses because insufficient evidence was supplied to prove that Ms. Anderes' criminal actions resulted in the need for the replacement of the sunglasses.

Statement of the Facts and Course of Proceedings

On May 24, 2012, an Information was filed charging Ms. Anderes with felony, battery on a probation officer; misdemeanor, possession of a controlled substance; and misdemeanor, possession of drug paraphernalia. (R., pp.33-34.) In June, an Information Part II was filed charging Ms. Anderes with being a persistent violator. (R., pp.47-48.) The Information was later amended to include a second count of

misdemeanor, possession of a controlled substance. (R., pp.125-127.) The case proceeded to trial. (R., pp.159-177, 182-188.)

At trial, the State presented the testimony of several people who were working at the parole and probation office on the day of the alleged battery: Christine Barrera did not see the altercation, but witnessed Officer Kightlinger's injuries and observed Ms. Anderes afterward. (*See generally* Tr., p.187, L.1 – p.209, L.24.) Tara Richardson heard a thump outside of her office and came out to find Officer Kightlinger on top of Ms. Anderes, saw the two were struggling, went to get help, returned to see the struggle continue. (*See generally* Tr., p.496, L.13 – p.511, L.7.)

Robert Kightlinger, the alleged victim, testified that he was watching Ms. Anderes for her parole officer; that she gathered her things; he told her to leave them in the chair, face the wall, and put her hands behind her back; she complied for a moment, then turned, grabbed her things and charged at him. (Tr., p.391, L.17 – p.393, L.7.) He stated that Ms. Anderes sprinted toward him, put her head down and ran into his chest, spinning him out into the hall. (Tr., p.395, Ls.1-23.) He then began struggling with her to get her into custody, moving against a wall and falling to the ground. (Tr., p.396, Ls.1-23.) While Ms. Anderes continued to struggle, Mr. Kightlinger was able to get them back on their feet. (Tr., p.398, Ls.1-22.) He then dropped her to the ground and dropped his weight on Ms. Anderes. (Tr., p .399, Ls.1-19.) At that point, Ms. Anderes became still and other officers arrived to assist. (Tr., p.399, L.24 – p.400, L.6.)

Ms. Anderes then testified that she placed her items on the ground as requested and then she started to put her hands behind her back, but then changed her mind, scooped up her belongings and ran towards the door. (Tr., p.570, L.14 – p.574, L.9.) At this time, Officer Kightlinger was parallel with her backing up toward the door, saying

"Whoa, Whoa, Whoa." (Tr., p.574, Ls.5-18.) She stated that she did not run into Officer Kightlinger, that he was running along side her, when she almost got out the door, the officer grabbed her and tackled her to the ground. (Tr., p.576, L.5 – p.577, L.16.) The two got back to their feet and then he dropped her to the ground again. (Tr., p.580, Ls.14-25.) During her testimony, Ms. Anderes also admitted possessing spice, a controlled substance, and drug paraphernalia. (Tr., p.617, L.13 – p.618, L.1.)

On rebuttal, the State presented the testimony of additional people who were working at parole and probation on the date of the incident: Christopher Phillips testified that he responded to a call for help, found Officer Kightlinger on the ground on top of Ms. Anderes who was "laying on the ground" and struggling a little bit, "not much." (Tr., p.631, L.14 – p.632, L.10.) Elias Martinez testified that when he came upon Officer Kightlinger and Ms. Anderes they were on the floor and Ms. Anderes was struggling, kicking, and flopping, so he restrained her legs. (Tr., p.650, L.4 – p.651, L.10.)

The jury found Ms. Anderes guilty of all of the charges. (R., pp.228-229.) She entered a guilty plea to the persistent violator enhancement. (Tr., p.790, L.7 – p.791, L.8.)

The district court sentenced Ms. Anderes to a unified sentence of twenty years, with five years fixed, for the battery upon a probation officer, enhanced by the persistent violator enhancement, and one year fixed each for the possession of a controlled substance and possession of paraphernalia convictions. (R., pp.282-285.) Ms. Anderes filed a Notice of Appeal timely from the Judgment and Conviction. (R., pp.292-296.) Following a hearing, the district court issued an Order for Restitution and Judgment ordering Ms. Anderes to pay $41,537.98 in restitution. (R., pp.306-307.)

Ms. Anderes also filed a timely Rule 35 motion for reduction of sentence. (R., pp.328-335.) The motion was denied. (R., pp.336-339.)

ISSUES

1. Did the state violate Ms. Anderes' right to a fair trial by committing prosecutorial misconduct?

2. Did the district court abuse its discretion when it ordered restitution for a portion of Mr. Kightlinger's surgery which repaired damage that was not proven to have been caused by Ms. Anderes and in ordering restitution for a pair of sunglasses that the State failed to prove were damaged or destroyed as a result of Ms. Anderes' criminal actions?

ARGUMENT

I.

The State Violated Ms. Anderes' Right To A Fair Trial By Committing Prosecutorial Misconduct

A. Introduction

Ms. Anderes asserts that the prosecutor committed misconduct in her case which requires the vacation of her conviction. The prosecution committed misconduct which rises to the level of fundamental error because the misconduct was related to one or more of Ms. Anderes constitutional rights and was so egregious that it may have contributed to the jury's verdicts. The unfairness created by the prosecutor's misconduct resulted in Ms. Anderes being denied due process of law and was in violation of her right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution. The violations occurred when the prosecutor repeatedly made statements during closing arguments vouching for prosecutorial witnesses and calling Ms. Anderes a liar. Although defense counsel did not object to these instances of misconduct, Ms. Anderes asserts that the prosecutorial misconduct amounted to fundamental error, was not harmless and, as such, this Court should vacate her conviction for battery on a probation officer.

B. Standard Of Review

Because Ms. Anderes' prosecutorial misconduct claims are grounded in constitutional principles, they involve questions of law over which this Court exercises free review. *City of Boise v. Frazier*, 143 Idaho 1, 2 (2006). Trial error ordinarily will not be addressed on appeal unless a timely objection was made in the trial court. *State v.*

Adams, 147 Idaho 857, 861 (Ct. App. 2009). On appeal, Ms. Anderes raises instances of un-objected to misconduct. Because these claims of error are raised for the first time on appeal, Ms. Anderes must establish that the errors are reviewable as "fundamental error." *State v. Perry*, 150 Idaho 209, 222 (2010). The Idaho Supreme Court recently revisited fundamental error and stated that to obtain relief on appeal for fundamental error:

> (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

Id. (footnote omitted). Thus, on a claim of fundamental error, a defendant must first show that the alleged error "violates one or more of the defendant's unwaived constitutional rights," and that the error "plainly exists" in that the error was plain, clear, or obvious. *Id.* at 228. If the alleged error satisfies the first two elements of the *Perry* test, the error is reviewable. *Id.* To obtain appellate relief, however, the defendant must further persuade the reviewing court that the error was not harmless, i.e., that there is a reasonable possibility that the error affected the outcome of the trial. *Id.* at 226-228.

C. The State Violated Ms. Anderes' Right To A Fair Trial By Committing Prosecutorial Misconduct

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion-basic in our law and rightly one of the boasts of a free society-is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon,* 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting). The Fifth Amendment to the United States Constitution states that, "[n]o

person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall...deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. Additionally, the Idaho Constitution also guarantees that, "[n]o person shall be...deprived of life, liberty or property without due process of law." ID. CONST. art. I, §13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters,* 99 Idaho 18, 19 (1978). Prosecutorial misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *State v. Sanchez,* 142 Idaho 309, 318 (Ct. App. 2005); *Greer v. Miller,* 483 U.S. 756, 765 (1987). In order to constitute a due process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant's right to a fair trial. *Id.* The hallmark of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips,* 455 U.S. 209, 219 (1982). The aim of due process is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Id.*

1. The Prosecution Committed Misconduct By Encroaching Upon The Jury's Function To Make Credibility Determinations When It Repeatedly Referred To Ms. Anderes As A Liar And Vouched For The Credibility Of The State's Witnesses

Closing argument "serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." *State v. Phillips,* 144 Idaho 82, 86 (Ct. App. 2007) (quoting *Herring v. New York,* 422 U.S. 853, 862 (1975)). Its purpose "is to enlighten the jury and to help the jurors remember and interpret the evidence." *Id.* (quoting *State v. Reynolds,* 120 Idaho 445, 450 (Ct. App. 1991)). "Both sides have traditionally

been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom." *Id.* (quoting *State v. Sheahan,* 139 Idaho 267, 280 (2003)). However, considerable latitude has its limits, both in matters expressly stated and those implied. *Id.*

Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. *State v. Irwin,* 9 Idaho 35, ___, 71 P. 608, 610 (1903). The prosecutor's duty is to see that the defendant has a fair trial by presenting only competent evidence and should avoid presenting evidence to prejudice the minds of the jury. *Id.* The prosecutor must refrain from deceiving the jury by use of inappropriate inferences. *Id.*

In the case at hand, the prosecution asked the jury to make a decision based upon her belief that Ms. Anderes was a liar and that the prosecution witnesses were truthful. The prosecution's statements went much further than the permissible bounds allowed to encourage a jury to question the credibility of witnesses.

Closing argument should not include the prosecutor's personal opinions and beliefs about the credibility of a witness or inflammatory words employed in describing the defendant. *Phillips,* 144 Idaho at 86. Generally, it may be improper to label the defendant as a "liar," for testimony given in his or her defense. *See State v. Kuhn,* 139 Idaho 710, 716 (Ct. App. 2003). Even when the defendant admitted to lying in connection with the case, excessive labeling of the defendant as a "liar" could be

viewed as an improper attempt to obtain a finding of guilt by disparaging the defendant before the jury. *State v. Gross*, 146 Idaho 15, 19 (Ct. App. 2008).

In *Lovelass,* the prosecutor informed the jury in closing argument that Lovelass had committed "full-fledged perjury," that Lovelass had lied on more than one occasion, and everything he said to the jury was fabricated. *State v. Lovelass*, 133 Idaho 160, 169 (Ct. App. 1999). The *Lovelass* Court stated that in closing argument, "both the prosecutor and defense counsel are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom," and that this includes "the right to identify how, from the party's perspective, the evidence confirms or calls into doubt the credibility of particular witnesses." *Id.* at 168 (citation omitted). However, "it is improper for a prosecutor to express a personal belief or opinion regarding the truth or falsity of any testimony or evidence or as to the guilt of the defendant." *Id.* (citation omitted). The Court of Appeals held that the comments did not constitute fundamental error as they appeared to have fallen within the broad range of fair comment on the evidence rather than an expression of the prosecutor's personal belief, but also recognized that the prosecutor's comments were troubling and less than artful. *Id.* at 169.

In *State v. Garcia*, 100 Idaho 108 (1979), the Idaho Supreme Court found that the prosecutor's comments that, "Mr. Garcia has been caught in this rather apparent contradiction, the lie, he didn't have the beer pitcher," and, "I don't believe Mr. Garcia's story, too many coincidences, too many slips and slides around the facts," constituted fundamental error, but that the error was harmless. *Id.* at 110-11. The *Garcia* Court held that it was error for the prosecutor to express a personal belief or opinion as to the

truth or falsity of the defendant's testimony, but in light of the overwhelming and conclusive evidence against Garcia, the error was harmless. *Id.* at 111.

In *Williams v. State*, 803 A.2d 927 (Del. Supr. 2002), reversible error was found due to the prosecutor's continued characterization of the defendant as a liar. The court found these improper comments as inflammatory, patently improper, and "so clearly impermissible that the trial judge had the duty to intervene, notwithstanding the absence of an objection by defense counsel." *Id.* at 930-31 (citations omitted). The *Williams* Court cautioned that the word "'liar' is an epithet to be used sparingly in argument to the jury.'" *Id.* at 930; *see also People v. Skinner*, 747 N.Y.S.2d 857, 858-59 (N.Y.A.D. 3rd Dept. 2002) (holding that even though trial counsel failed to object, reversal was warranted where, during closing argument, the prosecutor "made at least a dozen direct references to defendant being a liar, made other references to defendants 'false' and/or 'tailored story,'" and characterized the defendant's experts as his puppet, because such prosecutorial misconduct "was so flagrant and pervasive as to compel the conclusion that defendant was deprived of a fair trial.") (citations omitted.)

One way a prosecutor can commit misconduct is by vouching during his closing arguments for the credibility of the evidence he presented. *State v. Wheeler*, 149 Idaho 364, 368 (Ct. App. 2010). A prosecutor improperly vouches for evidence when he puts the prestige of the state behind that evidence, expressing his personal opinions or beliefs about the quality of that evidence. *Id.*

Idaho Rule of Professional Conduct 3.4 provides, "A lawyer shall not ... in trial ... state a personal opinion as to ... the credibility of a witness ... or the guilt or innocence of an accused." The rule applies to both the prosecuting attorney and to defense counsel. *State v. Carson,* 151 Idaho 713, 721 (2011). With respect to due process, the

United State's Supreme Court has explained why the prosecutor cannot vouch for a witness's credibility or express a personal opinion of the defendant's guilt stating:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. (quoting *United States v. Young,* 470 U.S. 1, 18–19 (1985)).

In the case at hand, the State vouched for the credibility of its witnesses and referred to Ms. Anderes as a liar numerous times during closing arguments. The prosecutor began dealing with credibility by correctly discussing the jury instruction telling the jury it was up to them to determine credibility, but immediately began to suggest that Ms. Anderes was not truthful and imply that the jury could disregard only her testimony because it should fully accept the testimony of the State's witnesses:

> Testimony is evidence, and the instructions tell you that the weight to be given to certain evidence is up for you to decide, which means you can decide to give no weight at all to hers. You can look at her credibility and you can figure out whether you even consider her story, as she calls it. And if you find that she's not credible, you don't have to weigh it equally with the testimony of more credible witnesses.

(Tr., p.751, Ls.12-19.) Admittedly, the prosecutor begins most of her credibility-related statement with proper arguments discussing the evidence and conclusions that could be drawn from the evidence. However, Ms. Anderes asserts that the prosecution crossed the line by immediately following these proper comments with impermissible statements inserting her personal view of the evidence, including repeatedly offering her opinion that Ms. Anderes is lying. This tactic was used over and over again throughout the closing arguments:

So when you consider her credibility, you know that she's lied to you about how that second handcuff went on. You have three people. Chris Phillips can't even remember these other people's names. He's not going to come up here and tell you anything that isn't true for a bunch of people he can't even recall well enough to give you their name. **He is very credible, and the others who tell you about that are as well.**

She has lied to you about being moved into that room. For what purpose that is, I don't know. But she wanted it to be very clear that she disagrees with Christine Barrera and Eli Martinez about being moved into that room. **They are sufficiently credible that you can define that as not being truthful. She lies** about kicking and struggling. There are four sets of eyes that tell you that she continued to struggle: Officer Kightlinger's, Tara Richardson's, Officer Martinez and Chris Phillips.

We talk about a burglary conviction during her cross-examination. She was also using controlled substances. Maybe some of those aren't lies. Maybe she can't remember very well some of these details, but she is not credible, and, again, she's the one who's charged with a crime here and has a lot at stake.

(Tr., p.753, L.9 – p.754, L.8 (emphasis added).)

So is Robert Kightlinger credible? Absolutely. You've got corroboration for many of the things that he says. He's the only set of eyes on her for some of the other things that he points out, but he is credible. He is corroborated in many details. **The manner in which he testified was very credible.** . . . **His non-verbals were very credible.** We talked about that in voir dire. His version of events make sense. There's logic that supports it as well, and he has no motive to be untruthful. He has no bias. He's never even known her before that day, so for what possible reason would there be for him to make up this story. **Very credible.**

Now, if you believe Eli Martinez, Tara Richardson and Chris Phillips, you can convict the defendant even if you don't believe Robert Kightlinger. They see enough, they hear enough, they know enough, really, to substantiate this charge even if you didn't have Officer Kightlinger's testimony, but you do and **he is a credible witness.**

(Tr., p.755, L.12 – p.756, L.10 (emphasis added).)

The prosecution theme of vouching continued in rebuttal closing:

Mr. Smith is a gifted storyteller, the likes of Mark Twain. Unfortunately, in this context, the story is only helpful if it's based on

> accurate facts, and he bases his on Ms. Anderes' version, which is not credible and not what has happened.

(Tr., p.774, Ls.15-19.)

> And, ultimately, counsel talks about the credibility of probation and parole officers. He tries to imply that this isn't how it happened; that Ms. Anderes' version is accurate. Why, if you are a professional probation and parole officer would you want to admit that you got beaten up by her, instead of saying you fell down at work? What bias does he have to make this up? What motive does he have to say she did this? None. **The only reason he has to get up there and tell you that this happened is because it's the truth. He swore to tell the truth and he did. And, like it or not, this is how it happened.**

(Tr., p.776, L.20 – p.777, L.6 (emphasis added).)

> Now, counsel implies that Eli Martinez came in today and talked about moving Ms. Anderes into that office, apparently, as a fabrication to backup what Ms. Barrera said. If Eli Martinez was willing to come in here and tell you a lie, wouldn't he have just told you that he saw her pounding her head on the desk too? He tells you that he had limited access with her when she's in that room because he went off to go make phone calls to get police and paramedics there. If this was going to be some, you know, cloaks and daggers thing, where people are coming in her [sic] and telling you things that aren't true, why does he happened to not he there when she pounds her head on the desk. Because he just didn't happen to be there. **That's the truth. And he did not come in here and say something that wasn't true about that because there's no motive.** Again, what would he get out of it? Who has a motive to be less than truthful and who has other markers of poor credibility? The defendant.

(Tr., p.778, L.20 – p.779, L.13.)

Ms. Anderes again reiterates that she is not asserting that the State cannot discuss credibility and does not object to the majority of the argument. However, she maintains that the comments by the prosecution crossed the line and amounted to more than a fair comment on the evidence or inferences to be drawn there from. Instead, they were attempts to characterize Ms. Anderes as an individual that could not be believed under any circumstances - a liar and to bolster the credibility of the State's witnesses. The comments did not merely present conflicting evidence and ask the jury

to draw its own conclusions, but told the jury the conclusions that they must reach because they were the conclusions of the prosecutor.

It is a violation of Ms. Anderes' Fourteenth Amendment right to a fair trial to have a jury reach its decision on any factor other than the evidence admitted at trial and the law as explained in the jury instructions. In this case, misconduct related to the prosecution expressing opinions regarding Ms. Anderes' credibility, disparaging her to the jury, and bolstering the credibility of the State's witnesses interfered with the jury's ability to make an impartial decision, thereby interfering with Ms. Anderes' Sixth Amendment right to an impartial jury. As such, the misconduct in this case clearly violates her unwaived constitutional rights and deprived her of her right to a fair trial. As such, this Court must vacate the conviction.

2. The Prosecutorial Misconduct Related To Vouching For Prosecution Witnesses And Calling Ms. Anderes A Liar Are Reviewable As Fundamental Error

Prosecutorial vouching for the credibility of a witness either through bolstering or undermining credibility is not merely an evidentiary issue as it is when a witness provides vouching testimony. Instead, it is a distinct form of prosecutorial misconduct that implicates a constitutional right.

First, it is a violation of Ms. Anderes Fourteenth Amendment right to a fair trial to have a jury reach its decision on any factor other than the evidence admitted at trial and the law as explained in the jury instructions. As such, prosecutorial misconduct, in general, directly violates a constitutional right. It should be noted that the Idaho Supreme Court stated in *Perry* that, "Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that

evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. This is an implicit recognition by the Idaho Supreme Court that prosecutorial misconduct claims are connected to a constitutional provision.

In this case, the misconduct also interfered with the jury's ability to make credibility determinations. The State violated Ms. Anderes' right to a jury trial when the prosecutor attempted to encroach upon the jury's vital and exclusive function to make credibility determinations. "The right to a jury trial contained in the Sixth Amendment . . . includes the right to have the jury be 'the sole judge of the weight of the testimony.'" *State v. Elmore,* 154 Wash. App. 885, 228 P.3d 760 (WA 2010) (quoting *State v. Lane,* 125 Wash.2d 825, 838, 889 P.2d 929 (WA 1995) (quoting *State v. Crotts,* 22 Wash. 245, 250-51, 60 P. 403 (1900)).

Additionally, the Idaho Court of Appeals, in an unpublished opinion, recently held that "unlike the elicitation of an opinion from a lay witness in regard to credibility, vouching by a prosecutor implicates a constitutional right." *State v. Anderson,* Supreme Court Docket Number 39227, Idaho Court of Appeals, 2013 Unpublished Opinion No.805 (December 30, 2013)[1]. While this case is not binding authority, it is limitedly persuasive on the issue of whether the type of misconduct prevalent in the case at hand deals with a constitutional right, not merely an evidentiary issue.

The misconduct in this case not only involved Ms. Anderes' state and federal constitutional rights to due process, but also her federal and state constitutional rights to

[1] Ms. Anderes recognizes that this is an unpublished opinion and is not to be cited as authority because it is neither case law nor binding precedent. *See* Internal Rule Of The Idaho Supreme Court 15(f) ("If an opinion is not published, it may not be cited as authority or precedent in any court."). Accordingly, Ms. Anderes is only citing to this case as an example of how the Idaho Court of Appeals has dealt with this argument in the past.

a jury trial. As such, the errors involve an unwaived constitutional right and are reviewable for fundamental error. The error in this case plainly exists from the record and no additional information is necessary. The record in this case suggests no reason to conclude that defense counsel elected, as a matter of trial strategy, to waive any objection when the prosecution vouched for the State's witnesses or disparaged the veracity of Ms. Anderes. Further, it cannot be a tactical decision on the part of the defense to have a jury reach a verdict, not based on the evidence and law, but based on impermissible grounds presented through misconduct. As such, the first two prongs of the *Perry* test are satisfied.

3. The Prosecutorial Misconduct Requires Vacation Of The Conviction

Neither misconduct objected to nor misconduct constituting fundamental error, will require vacating a conviction, unless the errors were not harmless beyond a reasonable doubt. *See State v. Christiansen,* 144 Idaho 463, 471 (2007); *see also State v. Field,* 144 Idaho at 571. The prosecutorial misconduct requires vacation of the conviction because it cannot be said that it did not affect the outcome of the trial. In the case at hand, the prosecution unabashedly referred to Ms. Anderes as a liar and encouraged the jury to find only its witnesses credible based upon the prosecutor's personal belief, not just upon the evidence and inferences there from. The prosecution's misconduct encouraged the jury to disregard their exclusive role as the judges of credibility in favor of the prosecutor's beliefs regarding credibility.

This is a case that largely hinges on credibility. One of the primary jury questions is whether Ms. Anderes ran into Officer Kightlinger or whether she attempted to run past him and he initiated contact by grabbing and tackling her. Only Officer Kightlinger and Ms. Anderes were present when the initial struggle began and no other witnesses were

able to testify about the initial contact. (*See generall* Tr.) Robert Kightlinger, the alleged victim, testified that he was watching Ms. Anderes for her parole officer; that she gathered her things; he told her to leave them in the chair, face the wall, and put her hands behind her back; she complied for a moment, then turned, grabbed her things and charged at him. (Tr., p.391, L.17 – p.393, L.7.) He stated that Ms. Anderes sprinted toward him, put her head down and ran into his chest, spinning him out into the hall. (Tr., p.395, Ls.1-23.) He then began struggling with her to get her into custody, moving against a wall and falling to the ground. (Tr., p.396, Ls.1-23.)

Ms. Anderes testified that she placed her items on the ground as requested and then she started to put her hands behind her back, but then changed her mind, scooped up her belongings and ran towards the door. (Tr., p.570, L.14 – p.574, L.9.) At this time, Officer Kightlinger was parallel with her backing up toward the door, saying "Whoa, Whoa, Whoa." (Tr., p.574, Ls.5-18.) She stated that she did not run into Officer Kightlinger, that he was running along side her, when she almost got out the door, the officer grabbed her and tackled her to the ground. (Tr., p.576, L.5 – p.577, L.16.)

The two versions of testimony force the jury to make a critical credibility determination. Other that the testimony about what occurred from Officer Kightlinger and Ms. Anderes, there was no additional evidence regarding the initial contact. Officer Kightlinger's injuries cannot corroborate either version of events specifically because he could have been injured in the same way regardless of how the initial contact occurred.

Furthermore, it was unclear from the conflicting testimony if Ms. Anderes was kicking Officer Kightlinger because the state's own witnesses disagreed about the struggle that ensued after the initial contact. Christopher Phillips testified that he responded to a call for help, found Officer Kightlinger on the ground on top of

Ms. Anderes who was "laying on the ground" and struggling a little bit, "not much." (Tr., p.631, L.14 – p.632, L.10.) Elias Martinez testified that when he came upon Officer Kightlinger and Ms. Anderes they were on the floor and Ms. Anderes was struggling, kicking, and flopping, so he restrained her legs. (Tr., p.650, L.4 – p.651, L.10.)

As such, under either theory for the battery, the jury had to make critical credibility determinations and the prosecutorial misconduct could have swayed the jury in making these determinations. This Court should find that the misconduct denied Ms. Anderes her right to a fair trial because it cannot say beyond a reasonable doubt that misconduct did not contribute to the verdict. In reviewing the trial as a whole, the prosecutor's improper comments, constituting misconduct, likely influenced the jury.

4. Even If The Above Errors Are Harmless, The Accumulation Of The Prosecutorial Misconduct Amounts To Cumulative Error

Ms. Anderes asserts that the prosecutorial misconduct errors which occurred throughout her closing were not individually harmless. However, assuming *arguendo* that this Court finds that they were, the accumulation of the errors and irregularities that took place negated her right to a fair trial and, thus, mandate reversal and a new trial. Ms. Anderes asserts that if this Court finds that more than one of the asserted, unpreserved, instances of prosecutorial misconduct is found to be fundamental error that these errors can then be reviewed for cumulative error for the purposes of determining if the prosecutor was engaging in a pattern of misbehavior. *State v. Ellington*, 151 Idaho 53, 70-71 (2011). Recently, the Idaho Supreme Court noted that when ruling on a motion for mistrial brought after an instance of alleged prosecutorial misconduct, the district court should not limit its view of the misconduct to the specific isolated incident, but should also take into consideration whether or not the prosecutor

is engaging in a pattern of misbehavior. *Id.* "Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial. However, a necessary predicate to the application of the doctrine is a finding of more than one error." *Perry,* 150 Idaho at 230.

Ms. Anderes asserts that given the multiple instances of prosecutorial misconduct, it is likely that even if each of the instances individually did not amount to reversible error, the accumulation of the misconduct including calling Ms. Anderes a liar and vouching for the prosecution witnesses, influenced the jury and deprived Ms. Anderes of her right to a fair trial.

II.

The District Court Abused Its Discretion When It Ordered Restitution For A Portion Of Mr. Kightlinger's Surgery Which Repaired Damage That Was Not Proven To Have Been Caused By Ms. Anderes And In Ordering Restitution For A Pair Of Sunglasses That The State Failed To Prove Were Damaged Or Destroyed As A Result Of Ms. Anderes' Criminal Actions

A. Introduction

During his surgery for damage to his shoulder that allegedly occurred when Ms. Anderes allegedly battered Officer Kightlinger, the doctor also preformed some work related to his joint, presumably related to his bone spurring and the calcification of his joint or arthritis caused by prior injuries. Ms. Anderes asserts that Mr. Kightlinger's arthritis was not caused by the battery and, as such, she should not have been ordered to pay for the costs of the surgery related to addressing these issues.

Furthermore, Ms. Anderes asserts that the State failed to present sufficient evidence that Mr. Kightlinger's sun glasses were damaged in the altercation and that, as a result, she should not have to pay for the costs of replacement.

B. Standard Of Review

The decision whether to order restitution, and in what amount, is within the discretion of a district court *State v. Lombard*, 149 Idaho 819, 822 (Ct. App. 2010). In reviewing the trial court's exercise of discretion, this Court must determine whether the trial court: (1) correctly perceived the issue as one involving the exercise of discretion; (2) acted within the outer boundaries of its discretion and consistently with any legal standards applicable to specific choices it had; and (3) reached its decision by an exercise of reason. *State v. Olpin*, 140 Idaho 377, 378 (Ct. App. 2004).

C. The District Court Abused Its Discretion When It Ordered Restitution For A Portion Of Mr. Kightlinger's Surgery Which Repaired Damage That Was Not Proven To Have Been Caused By Ms. Anderes Actions And In Ordering Restitution For A Pair Of Sunglasses That The State Failed To Prove Were Damaged Or Destroyed As A Result Of Ms. Anderes' Criminal Actions

The decision whether to order restitution, and in what amount, is within the discretion of a district court, guided by consideration of the factors set forth in I.C. § 19–5304(7) and by the policy favoring full compensation to crime victims who suffer economic loss. *State v. Lombard*, 149 Idaho 819, 822 (Ct. App. 2010). "Idaho Code Section 19-5304(6) provides that determination of economic loss is based upon the civil preponderance of evidence standard," and "the amount of the award must be supported by substantial evidence." *In re Doe*, 146 Idaho 277, 284 (Ct. App. 2008) (citations omitted). A trial "court's power to order restitution is limited to that provided by the statute." *State v. Straub*, 153 Idaho 882, 887 (2013). The State has the burden of proving the amount of restitution. *State v. Nienburg*, 153 Idaho 491, 497-498 (Ct. App. 2012).

1. The District Court Abused Its Discretion When It Ordered Restitution For A Portion Of Mr. Kightlinger's Surgery Which Repaired Damage That Was Not Proven To Have Been Caused By Ms. Anderes

Ms. Anderes does not challenge that a majority of the restitution ordered was done so properly. However, she asserts that a portion of Mr. Kightlinger's shoulder surgery was completed to address arthritis issues including calcification and bone spurring. Ms. Anderes asserts that the district court abused its discretion in ordering restitution for the entire surgery and not merely the portions necessary to address the physical injuries that were the result of the alleged battery.

Idaho Code § 19-5304(1)(a) provides:

> "Economic loss" includes, but is not limited to, the value of the property taken, destroyed broken, or otherwise harmed, lost wages, and direct out-of-pocket losses or expenses, *such as medical expenses resulting from the criminal conduct*, but does not include less tangible damages such as pain and suffering, wrongful death or emotional distress.

I.C. § 19-5304(1)(a) (emphasis added). In *Card*, the Court of Appeals explained, "[I]t is evident that under the restitution statute, a crime must 'result' in an economic loss in order for restitution to be awarded," and that "where treatment expenses are sought, the State bears the initial burden to make a prima facie showing . . . that the expenses were reasonable and necessary to treat injuries caused by the defendant's criminal conduct." *State v. Card*, 146 Idaho 111, 114-115 (Ct. App. 2008) (citing *In re Doe*). In addressing the plain language of the restitution statute, the Idaho Supreme Court noted, "Medical expenses are expressly included in the definition for economic loss in I.C. § 19-5304(1)(a) if they are *a direct result* of the criminal conduct." *Straub*, 153 Idaho at 890 (emphasis added).

From the beginning of treatment for Mr. Kightlinger's shoulder injury, doctors noted that there was prior damage and new damage. Dr. Gregory Schweiger saw

Mr. Kightlinger, examined his shoulder, and took x-rays. (PSI, p.78.)[2] Dr. Schweiger noted that Mr. Kightlinger had a prominence at his right acromioclavicular joint and his joint was tender. (PSI, p.78.) There were not abnormalities in the shoulder noted. (PSI, p.78.) Mr. Kightlinger denied any previous injuries. (PSI, p.78.) The x-rays showed that the joint had a prominent bone on the acromial and clavicular aspects where there was chronic calcifications from previous injuries. (PSI, p.78.) Dr. Schweiger ordered an MRI for further evaluation. (PSI, p.78.)

The MRI revealed that there was tearing of the superios glenoid labrum, tendinopathy of the distal supraspinatus, and mild acromioclavical joint degenerative change. (PSI, p.84.) Dr. Tadje again listed his impressions as right shoulder impingement, labral tear and acromioclavicular arthritis. (R., p.86.) Dr. Tadje interpreted the MRI as showing "a significant labral tear and some partial thickness tearing/inflammation of the rotator cuff." (PSI, p.86.) Later, Dr. Jared Tadje noted that Mr. Kightlinger's shoulder pain was likely caused by impingement, a labral tear, and acromioclavicular joint arthritis. (PSI, pp.76-77.) He recommended surgery. (PSI, p.86.)

During the surgery, Dr. Tadje found extensive labral tearing and repaired the tearing, reattaching the labrum to the glenoid. (PSI, p.87.) He then worked on the subacromial space which had "quite a bit of bursal inflammation" and need to have the soft tissue removed and smoothed out. (PSI, p.87.) Finally, Dr. Tadje began to work on

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[2] At the restitution hearing, the district court considered several pages of medical records. (Tr., p.802, L.19 – p.804, L.22.) These documents were attached to the PSI and considered pages 52-68. (Tr., p.803, Ls.8-13.) These documents are contained in the electronic copy of the PSI and are electronic pages 74 – 90. For ease of reference, the electronic file for the PSI and attachments will be cited as "PSI" and the pages citation will reference the electronic page number.

the AC joint which had "significant bone spurring" and narrowing. (PSI, p.87.) He "brought a bur in and removed the distal portion of the clavicle." (PSI, p.87.) He then removed the arthroscope and closed the portals. (PSI, p.87.)

Ms. Anderes asserts that the State failed to prove that her criminal actions were the cause[3] of Mr. Kightlinger's arthritis, bone spurring, or the calcification of his AC joint. Certainly, it is reasonable to believe, based upon common logic and the medical reports, that Mr. Kightlinger did not develop arthritis overnight as result of the alleged battery. Ms. Anderes asserts that ordering her to pay restitution to correct or alleviate arthritis related issues is akin to ordering an individual to pay for the cancer treatment of a victim whose cancer is discovered in the process of treatment for an injury cased in a criminal act. Just because the two medical issues involve the same physical area of the body does not mean the two have the same cause or that a defendant is required to pay for the additional treatment.

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[3] Ms. Anderes asserts that the alleged battery was not the actual or proximate cause of Mr. Kightlinger's shoulder issues related to arthritis, bone spurring, or calcification. Recently, the Idaho Supreme Court rearticulated the causations standards. *See State v. Corbus,* 150 Idaho 599 (2011). *Corbus* stated the following:

> As articulated by this Court in *Lampien,* causation consists of actual cause and true proximate cause. *Lampien,* 148 Idaho at 374, 223 P.3d at 757. "Actual cause is the factual question of whether a particular event produced a particular consequence." *Id.* (quoting *Cramer,* 146 Idaho at 875, 204 P.3d at 515). The "but for" test is used in circumstances where there is only one actual cause or where two or more possible causes were not acting concurrently. *Id.* On the other hand, true proximate cause deals with "whether it was reasonably foreseeable that such harm would flow from the negligent conduct." *Id.* (quoting *Cramer,* 146 Idaho at 875, 204 P.3d at 515). In analyzing proximate cause, this Court must determine whether the injury and manner of occurrence are so highly unusual "that a reasonable person, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected the injury to occur." *Id.* (quoting *Cramer,* 146 Idaho at 875, 204 P.3d at 515).

Id. at 602-603.

While Ms. Anderes admits that the district court can order restitution for the aggravation of a pre-existing condition, in the case at hand, the State provided no evidence that the pain suffered by Mr. Kightlinger was the result of an aggravation of his arthritis and not the result of the labral tear. *See Blaine v. Byers*, 91 Idaho 665, 674 (1967) ("The trial court by its instruction No. 16 correctly advised the jury that respondent was entitled to recover damages for disability resulting from the aggravation of a pre-existing condition, but was not entitled to recover for any disability which respondent may now be suffering which was not caused or contributed to by reason of the accident."); *see also* IDJI 9.02 (Aggravation of Pre-Existing Condition). As such, she asserts that it was an abuse of discretion for the district court to order her to pay for the entirely of the surgery. She requests that her case be remanded for a determination as to what costs of the surgery are attributable to her criminal acts and which portions are attributable to the correction of a pre-existing condition.

2. The District Court Abused Its Discretion When It Ordered Restitution For A Pair Of Sunglasses That The State Failed To Prove Were Damaged Or Destroyed As A Result Of Ms. Anderes Criminal Actions

Ms. Anderes asserts that the State failed to present sufficient evidence that Mr. Kightlinger's sunglasses were damaged or destroyed during the alleged battery. At the restitution hearing, the State presented the following information regarding the sunglasses:

> Q. And, then, in addition to the costs associated with your travel, did you have a financial loss based on the loss of a pair of Oakley sunglasses?
>
> A. Yes.
>
> Q. And did you know the market cost of those sunglasses when they were damaged?

A. Yes.

Q. And what was that?

A. I think it was $180.

(Tr., p.816, L.20 – p.817, L.3.)

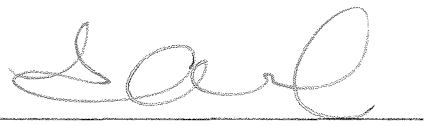
The questioning implied that Officer Kightlinger lost a pair of sunglasses, but did not ask how or when they were lost. Later, the State asked a question which presupposed that the sunglasses had been "damaged" not lost. It is unclear if the sunglasses were destroyed or lost because the State failed to examine Mr. Kightlinger on the issue. More importantly, the State did not present any evidence that the sunglasses were lost or damaged as a result of Ms. Anderes' actions. Additionally, the State failed to present sufficient evidence regarding the cost of the sunglasses. While Mr. Kightlinger's memory of the cost may be sufficient, his non-committal answer that he thought it was about $180 is insufficient to prove the cost.

The State failed to present any evidence, let alone substantial and competent evidence, that the sunglasses were damaged during the battery or as a result of the battery. As such, it was an abuse of the district court to order restitution for the sunglasses.

CONCLUSION

Ms. Anderes respectfully requests that her felony conviction be vacated and her case remanded for a new trial. Additionally, she requests that her restitution order be vacated. She requests that her case be remanded for a new restitution hearing for the limited purpose of determining what portion of the cost of the shoulder surgery she is responsible.

DATED this 22nd day of August, 2014.



ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of August, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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DISTRICT JUDGE
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EAA/eas